(1)

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

MID AMERICA TITLE COMPANY,

Petitioner,

v.

TRANSNATION TITLE INSURANCE COMPANY and LAND AMERICA FINANCIAL GROUP, INC.,

Respondents.

- ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner entered into an agency agreement with Respondent Transnation which prohibited the Respondent from directly or indirectly issuing policies of title insurance in Petitioner's exclusive geographical territory. Petitioner alleges that Respondents breached this agreement by indirectly issuing policies of title insurance through related sister companies owned by the same holding company.

The question presented is whether the decision to pierce the corporate veil and/or to treat sister companies as alter egos should be made by a jury as the trier of fact or whether it should be made by a trial judge or a court of appeal as a matter of law? There is no definitive authority on this issue.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Mid America Title Company is a valid Illinois corporation in good standing. At all times relevant hereto, it had no corporate parents and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's judgment entering a jury verdict in favor of the Petitioner is included herewith as Appendix C. The district court's denial of Respondent's motion for judgment as matter of law, alternative motion to amend the judgment, or for a new trial is included herewith as Appendix B. The court of appeals opinion reversing the district court is published at 332 F.3d 494 and is included herewith as Appendix A. The court of appeals denial of a petition for panel rehearing is included herewith as Appendix D.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on June 16, 2003, and denied rehearing on July 3, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Petitioner Mid America Title Company is a title insurance agent and provider of escrow settlement services in connection with real estate transactions. Respondent

Transnation Title Insurance Company is a real estate title insurance underwriter. Respondent Land America Financial Group, Inc. is a holding company that owns several title insurance underwriters, including Transnation.

In 1983, Mid America entered into an agency agreement with Transnation. It provides that Mid America would be Transnation's exclusive agent for title insurance and escrow settlement services for real estate transactions in the Chicago area. The agreement also provided that Transnation would refer all of its title insurance business in the Chicago area to Mid America. Importantly, the agreement prohibited Transnation from directly or indirectly issuing policies of title insurance in the Chicago area through anyone other than Mid America.

In reliance upon the exclusive agency agreement, Mid America entered into and expanded its business operations including but not limited to owning and leasing office space in the geographical area, hiring and training qualified personnel for the handling of business, preparing and maintaining files relating to applications for title insurance, and creating and maintaining title insurance plants for a multi-county area.

In 1990, Reliance Insurance Company, the parent company of Commonwealth Land Title Insurance Company (hereinafter referred to as "Commonwealth"), purchased Transnation. Shortly after the acquisition of Transnation by Reliance Insurance Company, Transnation and Commonwealth merged together their Illinois business operations. Since 1990 and continuing through present, Transnation and Commonwealth have shared officers, directors and trustees. Commonwealth has maintained both direct and agency operations in the Chicago area since 1990.

In 1998, Respondent Land America Financial Group (hereinafter referred to as "Land America") acquired all of the issued and outstanding shares of Transnation and Commonwealth. Since that time, Land America has continued transacting business by and through its subsidiary title insurance companies, Commonwealth, Transnation and Lawyers' Title Insurance Corporation (hereinafter referred to as "Lawyers Title"). Lawyers Title has maintained both direct and agency operations in the Chicago area since 1998.

Since February 1998 and continuing through present, Land America, Transnation, Commonwealth and Lawyers' Title have shared some of the same officers, directors and trustees. Since September 1998, employees of Land America jointly responsible for all Transnation, Commonwealth and Lawyers Title operations in the State of Illinois have shared the same office space in Chicago, Illinois. Transnation is a wholly owned subsidiary of Land America and uses its profits to pay dividends to Land America. Commonwealth and Lawyers Title compete with Mid America for title insurance business.

The President of Transnation, Commonwealth and Lawyers Title is the same person. The corporate vice president and secretary for all three entities is also one person. Respondents did not offer evidence of the existence of any one person who is an employee of only one of the three title companies that compromise the LandAmerica group. The individuals who testified at trial comprised all of the top level executives responsible for Illinois operations during the relevant time periods.

In 1997, the Chief Executive Officer and Chief Operating Officer of Commonwealth invited the President of

Mid America to attend a social function at the Kentucky Derby. This correspondence was sent on Commonwealth letterhead despite the fact that Mid America is a Transnation agent. Mid America received other correspondence relating to business operations of their underwriter on Commonwealth letterhead.

Title insurance agents such as Mid America are often required to issue hold harmless letters in the regular course of their day-to-day business. A hold harmless letter is an assurance to another title company or to a third-party that a title insurance policy issued by the agent is valid and binding. It states that subsequent parties obtaining an interest in the insured real estate will be protected and indemnified for any matters which might or could relate to defects in title which arose prior to the issuance of the agent's policy. Since April 1998, it has been the policy of Land America, Transnation, Commonwealth and Lawyers' Title to not require hold harmless letters if a party to the transaction they are asked to insure produces a prior policy from Transnation, Commonwealth or Lawyers' Title.

In or about August of 1998, Mid America solicited Michael Freedman to become an attorney agent for Transnation and accepted an attorney agent application from him. Transnation rejected the application. Less than six months after rejecting Michael Freedman as a Transnation attorney agent, Michael Freedman d/b/a BL Title applied to become a title insurance agent with Lawyers' Title. Lawyers' Title accepted Michael Freedman d/b/a BL Title as an agent in early 1999.

The Agency Agreement between Transnation and Mid America states "Transnation does solicit employee

transfer business and other national real estate transactions. Transnation shall refer to issuing agent (i.e. Mid America) all such business that is obtained in the territory of issuing agent including but not limited to, business derived from any Transnation branch offices". Mid America complained to Transnation about what it believed to be a lack of referrals.

From 1990 through 1995, Preferred Land Title Insurance Company was a title insurance agent for Commonwealth in Mid America's geographical territory. In late 1995 or early 1996, Preferred Land Title Company was closed down. At the time Preferred Land Title was closed down, an officer of both Commonwealth and Transnation referred the existing business of Preferred Land Title to Imperial Land Title, Inc., a Commonwealth agent who is engaged in direct competition with Mid America.

On September 13, 1990, an attorney with offices in Denver Colorado placed an order for a title commitment on property located in Lake County, Illinois to Transnation's Denver, Colorado office. LandAmerica and Transnation were contractually obligated to refer said title insurance order to Mid America. The Denver office of Transnation instead referred the order to the downtown Chicago office of Lawyers' Title.

Land America has a site on the World Wide Web which contains an office locator section. If a visitor to that web site asks for a Transnation agent in Waukegan, Illinois (Mid America's home base), they are told that no such agent exists. Instead, they are referred to a Commonwealth office in Chicago, Illinois.

In April 2001, Land America ran advertisements in Northern Illinois Real Estate Magazine and Metro Chicago Real Estate magazine. The ad states "Land America Financial Group, Inc. is the parent company of Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation and Transnation Title Insurance Company. The three title insurance companies offer products and services under their own familiar names but operate as one company with one management team." Those magazine ads were consistent with the statements made by upper level management in 1997.

Mid America filed a complaint in state court alleging breach of its agency agreement. Respondents removed the case to federal court pursuant to 28 U.S.C. § 1446 and 28 U.S.C. § 1332. Jurisdiction arose under 28 U.S.C. § 1441 because of a complete diversity of citizenship between the plaintiff and both defendants, because none of the defendants was a citizen of the state of Illinois and because the amount in controversy exceeded $75,000.00.

Mid America's complaint alleged that by allowing its officers, directors, trustees, employees and agents to issue Commonwealth and Lawyers Title title insurance policies in Mid America's geographical territory, Transnation breached its Agency Agreement with Mid America. Said Agreement prohibits Transnation from indirectly issuing policies covering real property in said territory. Mid America did not give approval to the officers, directors, trustees, employees and agents of Transnation to also issue policies through Commonwealth or Lawyers Title in Mid America's geographical territory.

The evidence adduced at trial showed that in the eleven years from 1990 through 2001, Mid America remitted $4,700,000.00 in net title insurance premiums to Transnation. During the same period, Transnation paid out only $1,000,000.00 in claims. Therefore, the net profit to Transnation during the aforesaid time period was $3,700,000.00. Transnation and Land America offered absolutely no evidence to refute the $3,700,000.00 figure.

After some three days of trial, a jury returned a verdict in favor of Land America and against Mid America. It also returned a verdict in favor of Mid America against Transnation and awarded damages in the amount of $1,500,000.00. The trial court entered judgment consistent with the jury verdict and denied without comment Respondents' post trial motions for judgment as a matter of law, to amend the judgment and for a new trial.

The Appellate Court reversed the jury's verdict and the judgment entered consistent with it. The reason given was that there was insufficient evidence for the jury to have found that Transnation was the alter ego of either of the other underwriters. By so doing, the Appellate Court substituted its judgment for the judgment of the jury. The Appellate Court also denied a petition for panel rehearing.

REASONS FOR GRANTING THE PETITION

The petition should be granted because there are is no definitive authority on whether the decision to pierce the corporate veil and/or to treat sister companies as alter egos should be made by a jury as the trier of fact or whether it should be made by a trial judge or a court of appeal as a matter of law.

Respondents were contractually bound "not to issue, directly or indirectly, policies covering real property within the territory other than through issuing agent (i.e. Mid America), without issuing agents approval." Mid America does not allege that Transnation directly issued title insurance policies. Instead, the evidence at trial showed that Transnation indirectly issued policies in the relevant territory by allowing Transnation and Commonwealth to commingle their operations since 1990 and by allowing Transnation and Lawyers Title to commingle their operations since 1998.

Rather than allowing itself to act solely as the Plaintiff's principal underwriter, Transnation competed with the Plaintiffs for title insurance business. While no entity other than Mid America issued title insurance policies on Transnation paper in the geographical territory, all Transnation employees responsible for its Illinois operations performed the same functions for Commonwealth and Lawyers Title as they did for Transnation.

With the agreement of the parties and the trial court, the jury was given a "Corporate Entity – Alter Ego" instruction based on Arizona law, the state of Transnation's incorporation, to wit:

> A corporation, generally, is a separate legal entity authorized under the law to do business in its own right and on its own credit as distinguished from the credit and assets of other persons or corporations. Also, the mere fact that one or two individuals own and control the stock structure of a corporation, or that two corporations have

> common officers or directors, or both, does not mean that the corporation may be regarded as the alter ego of its stockholders.
>
> However, the existence of a corporate entity may be disregarded where it is proved that the corporation was created as a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.
>
> Where one corporation is the principal stockholder of several corporations and conducts their business or manages their assets, that corporation may be found individually liable for the corporate obligations of the other corporations. In order to find the first corporation liable, the plaintiff must prove that the first corporation has consistently engaged in a course of conduct ignoring the existence of the other corporations' corporate identities and has, in fact, conducted business by exercising such paramount control over the operations of the several corporations that their corporate existence has been disregarded and their business interests and the first corporation's own interests cannot be reasonably separated.

Given that instruction, the jury made a factual determination that Transnation should be held responsible for using its siblings, Commonwealth and Lawyer's Title, to compete with Mid America in Mid America's exclusive

geographical territory. The district court concurred with the jury's determination and denied motions for judgment as a matter of law, to amend the judgment and for a new trial. The appellate court disregarded these findings of fact and determined, as a matter of law, that Transnation should not be treated as the alter ego of Commonwealth and Lawyer's Title.

The lack of definitive authority on whether to treat the decision to pierce the corporate veil and/or to treat sister companies as alter egos as an issue of fact or as a matter of law is well summarized in *McCall Stock Farms, Inc. vs. United States*, 14 F.3d 1562 (Fed. Cir. 1993), to wit:

> In circumstances where a court is called upon to pierce a corporate veil in the first instance, . . . there is a division of opinion about the precise nature of such judicial action and, as a result, the proper standard of appellate review. It is generally recognized that disregarding the legal separateness of a corporation and the individuals who control it entails the exercise of equitable power. *See* 1 William M. Fletcher, Cyclopedia of the Law of Private Corporations § 41.25 (rev. ed. 1990 & Supp. 1992); *see, e.g., First Nat'l City Bank vs. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983); *International Controls Corp. vs. Vesco*, 490 F.2d 1331, 1350-1351 (2nd Cir.), *cert. denied*, 417 U.S. 932, 41 L. Ed. 236, 94 S. Ct. 2644 (1974). This view reflects the classical conception of equity's function, even in a merged procedural system, of relieving individuals from the operation of a generally just legal rule to prevent a

particularized injustice that the framers of the rule cannot be presumed to have intended. *See, e.g., First National City Bank*, 462 U.S. at 629; 1 William S. Blackstone, Commentaries on the Laws of England 61 (1765) (citing Grotius); 3 *id.* at 429-32. Because of its discretionary and ad hoc nature, *see* Henry L. McClintock, Handbook of the Principles of Equity 2, 49, 51 (1948), equitable dispensations traditionally have been reviewed on appeal under an abuse of discretion standard, *Brotherhood of Locomotive Engineers vs. M.K.T.R. Co.*, 363 U.S. 528, 535, 4 L. Ed. 2d 1379 80 S. Ct. 1326 (1960); *see e.g., Consumer's Co-op vs. Olsen*, 142 Wis. 2d 465, 419 N.W.2d 211, 213 (Wis. 1988).

On the other hand, some courts treat the alter ego determination as a question of fact reviewed under the "clearly erroneous" standard, *see, e.g., United States vs. Joh-T Chems., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985), and the ultimate decision to pierce the corporate veil as a conclusion of law, albeit one that follows almost automatically from the ultimate factual finding concerning alter ego status, subject to de novo review. *See* 1 Fletcher, supra, § 41.95. This approach is consistent with the view that the doctrine has been fully absorbed into the law itself, thus constituting an exception to, rather than a suspension of, the legal rule of corporate separateness. See generally *Piper Aircraft Corp. vs. Wag-Aero, Inc.*, 741 F.2d 925, 937, 939 (7th Cir. 1984) (Posner, J., concurring).

To supplement the above quotation from *McCall Stock Farms*, the Second Circuit and the Fourth Circuit have held that the determination of whether to pierce the corporate veil is a question of fact which must be determined by a jury. *See Wm. Passalacqua Builders vs. Resnick Developers*, 933 F.2d 131 (2nd Cir. 1991) and *In re: County Green Ltd. Partnership*, 604 F.2d 289 (4th Cir. 1979).

A writ of certiorari should be granted in this case because it will give the Court the opportunity to clarify a now vague but very important issue. In an era where corporations, both publicly traded and privately held, are collapsing in alarming and often scandalous fashion, the lower courts need guidance on how to handle issues relating to alter egos and piercing of the corporate veil. This case also gives the Court an opportunity to resolve any inconsistencies between the circuits as recognized in *McCall Stock Farms*.

However this court rules, new and significant precedent will be established. If this court chooses to reverse the appellate court and affirm the district court, it will establish that whether to hold one corporation responsible for the acts of its sibling corporations is a question of fact. If this court chooses to affirm the appellate court, the determination of alter ego status will be left solely to the courts as a matter of law without the need for a jury determination. Either way, confusion over how to treat litigation over alter ego and corporate veil issues in the future can be eliminated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 16, 2003

IN THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

Nos. 02-1432, 02-1469

MID AMERICA TITLE COMPANY,

Plaintiff-Appellee, Cross-Appellant,

v.

TRANSNATION TITLE INSURANCE COMPANY,

Defendant-Appellant, Cross-Appellee,

and

LANDAMERICA FINANCIAL GROUP, INC.,

Defendant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 2060—Suzanne B. Conlon, *Judge*

ARGUED DECEMBER 13, 2002—DECIDED JUNE 16, 2003

Appendix A

Before RIPPLE, KANNE, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* In this appeal Mid America Title Company, a title insurance agent, defends a jury verdict it obtained against Transnation Title Insurance Company, a title insurance underwriter, in a diversity suit for breach of contract. Because we conclude that there was insufficient evidence for the jury to find that Transnation was the alter ego of its sibling corporations, we reverse the district court's judgment.

In 1983, Mid America contracted with Transnation (then known as Transamerica Title Insurance Company) to be its exclusive agent for issuing title insurance policies covering real property located in Chicago and surrounding areas. Under the agency agreement Transnation promised "not to issue, directly or indirectly, policies covering real property within the territory other than through ISSUING AGENT [i.e., Mid America]." In 1990, Transnation was acquired by Reliance Insurance Company, the parent company of Commonwealth Land Title Insurance Company, another title insurance underwriter that had long been operating in the Chicago market. Later, in 1998, a holding company called LandAmerica Financial Group, Inc. acquired both Transnation and Commonwealth. LandAmerica owned a third Chicago-area underwriter, Lawyers Title Insurance Corporation, and so the three underwriters—Transnation, Commonwealth, and Lawyers Title—became "siblings" under their common parent company, LandAmerica. Mid America, which was aware of the acquisitions, had renewed its contract with Transnation for a ten-year term in 1995. In 2001, however, Mid America sued both Transnation

and LandAmerica for breaching the above-quoted contract provision. The jury found in favor of LandAmerica (which was not a party to the contract) but awarded $1.5 million against Transnation, which brought this appeal.

Mid America concedes that no Chicago-area policies were issued on Transnation paper, but the parties agree that Transnation's sibling underwriters—Commonwealth and Lawyers Title—to issue their own policies within Mid America's territory after the acquisitions. Neither Commonwealth nor Lawyers Title was a party to the contract, but Mid America contends that their actions nonetheless constitute a breach of the contract by Transnation because the three underwriters, in Mid America's words, "commingled" their operations. The rule in Arizona, where Transnation is incorporated, is that corporations are legally separate entities whose acts are not imputed to their officers, shareholders, or affiliates. In rare cases Arizona courts will pierce the corporate veil and declare a corporation the alter ego of another entity, *see Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 729 (Ariz. 1991) (in banc), but mere common ownership is insufficient for piercing, *see, e.g., Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 700 P.2d 902, 907 (Ariz. Ct. App.1985). Instead, Arizona courts require a showing that the corporations share a "unity of control" and that observance of the corporate form would sanction a fraud or promote injustice. *See, e.g., Taeger v. Catholic Family & Cmty. Servs.*, 995 P.2d 721, 733 (Ariz. Ct. App.1999); *State v. Angelo*, 800 P.2d 11, 14 (Ariz. Ct. App.1990). We view the additional evidence tending to show that the underwriters were commonly controlled in the light most favorable to Mid America.

First, there was evidence that the three underwriters had overlapping corporate officers: they shared the same president (Janet Alpert), senior vice president (J. Scott McCall), and vice president (William Perrine, who also was vice president of LandAmerica). Perrine also served as corporate secretary for Commonwealth and Transnation, and as assistant secretary for Lawyers Title. But this, too, is insufficient evidence of unity of control under Arizona law, *see Deutsche Credit Corp. v. Case Power & Equip. Co.*, 876 P.2d 1190, 1195 (Ariz. Ct. App.1994); *Bischofshausen*, 700 P.2d at 907; *Jabczenski v. Southern Pac. Mem'l Hosps., Inc.*, 579 P.2d 53, 59 (Ariz. Ct. App.1978), even when considered in combination with common ownership, *see Horizon Res. Bethany Ltd. v. Cutco Indus., Inc.*, 881 P.2d 1177, 1180 (Ariz. Ct. App.1994).

Second, the three underwriters consolidated their operations after the acquisitions. LandAmerica ran advertisements and sent letters to its agents explaining that its underwriters would henceforth "operate as one company" under the direction of a "unified management team" while continuing to "offer products and services under their own familiar names." The underwriters began sharing a downtown Chicago office as well as a number of employees, including a claims counsel, agency supervisor, regional manager, and two state agency managers. Two of those managers testified that they performed work for two or more of the underwriters but drew their salaries from only one. This operational streamlining also meant that the underwriters no longer dealt with each other at arm's length: Transnation, which in the past had required indemnification ("hold harmless") letters from the previous insurer before issuing a new title policy,

ceased requiring such letters in cases where either Commonwealth or Lawyers Title was the prior insurer. At times the divisions between the underwriters seem to have been ignored entirely, as on the several occasions Mid America received correspondence pertaining to its agency relationship with Transnation that was signed by Commonwealth officials and written on Commonwealth letterhead. One such letter even addressed Mid America as an "agent" of Commonwealth, which it was not. Evidence also showed that LandAmerica's website referred users searching for Transnation agents to Commonwealth instead and that a Transnation office once referred a policy request it received to Lawyers Title.[1] (LandAmerica had a financial incentive to divert business from Transnation, which was bound by the agency agreement to issue Chicago-area policies only through—and thus share premiums with—its exclusive agent, Mid America. Lawyers Title was not so bound and could issue Chicago-area policies directly, resulting in greater profits.) An employee charged with insuring the profitability of all three underwriters, when asked how he decides "where business goes," testified that a policy request from an out-of-state Commonwealth or Lawyers Title office would "probably" be referred to the local office of the same underwriter.

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1. A different clause of the agency agreement required Transnation to refer all "national real estate business" involving Chicago-area property to Mid America, and a separate count of Mid America's complaint charged that this referral constituted a breach of that clause. The district court granted judgment in favor of Transnation on that count, however, and Mid America has not appealed that ruling.

Notably, however, much of the evidence Arizona courts typically rely on in piercing corporate veils is absent from this case. There is no evidence that any of the underwriters or holding companies were sham corporations formed to siphon off Transnation's (and thus Mid America's) business, *see Ize Nantan Bagowa, Ltd. v. Scalia,* 577 P.2d 725, 729-30 (Ariz. Ct. App.1978) (party seeking to pierce must show financial setup of corporation is a sham; refusing to pierce where no evidence showed corporation was formed to defraud plaintiff); no evidence that any agents or policyholders were confused about which underwriter they dealt with, *cf. Gatecliff,* 821 P.2d at 729 (citing potential for customer confusion as an alter ego factor); and no evidence that the underwriters held themselves out to Mid America or anyone else as being one entity, rather than three closely related but separate entities, *cf. id.* (piercing where affiliated corporations used similar names). Finally, and perhaps most importantly, there is no evidence that the underwriters neglected any corporate formalities. *See Gatecliff,* 821 P.2d at 728; *Deutsche Credit,* 876 P.2d at 1195-96 (alter ego factors include whether corporation observes formalities of separate corporate existence such as maintaining corporate financial records, holding corporate meetings, and filing corporate income tax returns and annual reports with the Arizona Corporation Commission). On the contrary, the evidence was undisputed that each underwriter maintained separate accounting books, bank accounts, financial statements, and corporate records, held separate board meetings, and filed individual tax returns and reports with regulatory bodies. *Cf. Standage v. Standage,* 711 P.2d 612 (Ariz. Ct. App.1985) (corporation that failed to file corporate tax returns and reports with ACC and failed to maintain corporate books and

records was alter ego of its 50% owner and sole operator). Viewing the evidence as a whole, we do not think it is sufficient to show the degree of common control necessary to treat the underwriters as alter egos under Arizona law. *See, e.g., Oldenburger v. Del E. Webb Dev. Co.,* 765 P.2d 531, 536 (Ariz. Ct. App.1988) (refusing to pierce despite one corporation's ownership of and complete veto power over actions of another); *Bischofshausen,* 700 P.2d at 906-07 (refusing to pierce where one person was primarily responsible for controlling two corporations that shared an office, phone number, and two employees).

We note, moreover, that Mid America does little to address the second prong of the test, which requires a showing that veil-piercing is necessary to avoid fraud or injustice. *See, e.g., Chapman v. Field,* 602 P.2d 481, 484 (Ariz. 1979) (in banc); *Deutsche Credit,* 876 P.2d at 1195. *Cf. Gatecliff,* 821 P.2d 729 (piercing to prevent denial of recovery to plaintiff whose health insurance was cancelled); *Standage,* 711 P.2d at 615 (piercing in divorce proceeding where family-owned corporation held substantial portion of community property); *Cammon Consultants Corp. v. Day,* 889 P.2d 24, 232-33 (Ariz. Ct. App.1994) (piercing sham corporation that property owner used to buy up tax liens on his own property). (Mid America insists that this case is "not about" veil-piercing, but it offers no other explanation how the acts of one corporate entity might be deemed a breach of contract by a separate entity.) Mid America makes no attempt to explain what tangible benefits stemmed from the exclusivity clause, which of course did not guarantee Mid America a certain percentage of the Chicago title insurance market but merely eliminated one source of competition (Transnation).

But even a showing that Mid America was denied the benefit of its bargain would be insufficient to justify veil-piercing under Arizona law. *See Chapman,* 602 P.2d at 484; *Ferrarell v. Robinson,* 465 P.2d 610, 613 (Ariz. Ct. App. 1970).

Because there was insufficient evidence for the jury to have found that Transnation was the alter ego of either of the other underwriters, the district court's denial of Transnation's motion for judgment as a matter of law was error.

REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION ENTERED JANUARY 29, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

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Case Number: 1:01-cv-02060 Other Court No.: 01 L148

Title: Mid Amer Title Co v. Transnation Title

Assigned Judge: Honorable Suzanne B. Conlon

MINUTE ORDER of 1/29/02 by Hon. Suzanne B. Conlon:

Defendant Transnation Title Insurance Company's renewed motion for judgment as matter of law; alternative motion (A) to amend the judgment [47-1], or (B) for a new trial are denied [47-2]. Defendant Transnation Title Insurance Company's motion to approve conditions of a supersedeas bond to be posted in order to stay execution of or proceedings to enforce judgment, etc is granted [48-1]. Mailed Notice

This docket entry was made by the Clerk on February 1, 2002

Appendix B

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION ENTERED JANUARY 11, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 01 C 2060

Judge Conlon

Mid America Title Co

v.

Transnation Title Insurance Co

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

* * *

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Mid America Title Company and against defendant Transnation Title Insurance Company in the amount of $1,500,000.00. Judgment is entered in favor of defendant LandAmerica Financial Group, Inc. and against plaintiff Mid America Title Company.

Appendix C

Michael W. Dobbins, Clerk of Court

s/ Sonya Banks
Sonya Banks, Deputy Clerk

Date: 1/11/2002

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED JULY 3, 2003

UNITED STATES COURT OF APPEALS ch
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 3, 2003

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01 C 2060

Suzanne B. Conlon,
Judge.

Nos. 02-1432 & 02-1469

MID AMERICA TITLE COMPANY,

Plaintiff-Appellee,
Cross-Appellant,

Appendix D

v.

TRANSNATION TITLE INSURANCE COMPANY,

Defendant-Appellant,
Cross-Appellee

and

LAND AMERICA FINANCIAL GROUP, INC.,

Defendant, Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division

Upon consideration of the PETITION FOR PANEL REHEARING, filed on June 24, 2003, by counsel for the plaintiff,

IT IS ORDERED that the petition is DENIED.

No. 03-538

IN THE

Supreme Court of the United States

MID AMERICA TITLE COMPANY,

Petitioner,

v.

TRANSNATION TITLE INSURANCE COMPANY
and LANDAMERICA FINANCIAL GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The question presented is whether the appellate court applied the proper standard in reviewing and reversing the district court's denial of defendant's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b)(1). The Seventh Circuit reviewed the district court's decision *de novo*. There is no disagreement among the circuits that this is the proper standard to apply to the review of a denial of a motion for judgment as a matter of law.

STATEMENT PURSUANT TO RULE 29.6

Respondent Transnation Title Insurance Company ("Transnation") is wholly owned by Respondent LandAmerica Financial Group, Inc ("LandAmerica"). LandAmerica (which is traded on the N.Y.S.E.) has no parent company and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Introduction.

Petitioner's question as to whether the decision to pierce the corporate veil and treat sister corporations as alter egos is a question of fact to be made by a jury or a question of law to be made by the court is an invented one, bearing no relation to the matter at hand or to the Seventh Circuit's decision in favor of Transnation. In the instant case, after the trial court denied Transnation's motion for judgment as a matter of law, Transnation appealed that decision to the Court of Appeals for the Seventh Circuit. As set forth by Fed. R. Civ. P. 50(b), a motion for judgment as a matter of law in a jury case is a challenge to the sufficiency of the evidence support the verdict. *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001). The Seventh Circuit reviewed the trial court's denial of the motion *de novo*. All of the circuits agree that this is the proper standard of review for a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) and (b). *Infra*. The Seventh Circuit, applying the proper standard of review, found that there was insufficient evidence to support the jury's verdict and, therefore, that the trial court had erred in denying Transnation's Rule 50(b) motion. The Seventh Circuit did not substitute its judgment for the jury's or weigh the credibility of evidence nor did it find, nor state in dicta, that the question whether to pierce the corporate veil and treat the sister corporations as alter egos is a question of law as Petitioner seems to argue. Petitioner's petition misapprehends and misstates the ruling of the Seventh Circuit and the appropriate standards of review in hopes of creating an issue for this Court.

Disregarding those counts of Mid America's complaint that were dismissed prior to verdict, Mid America alleged that Transnation breached the agency agreement between Mid American and Transnation by reason of the issuance of title insurance policies in the Chicago-area: (a) from 1990 to the present by non-party Commonwealth, a sibling corporation to Transnation (Count I); and (b) from 1998 to the present by non-party Lawyers Title (Count II), also a sibling corporation to Transnation. The case was tried to a jury which returned verdicts: (a) against Transnation, awarding Mid America $1,500,000; and (b) in favor of defendant LandAmerica. After the verdict, Transnation filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or, alternatively: (a) to alter or amend the judgment; or (b) for a new trial. The motion was denied in its entirety by the district court. On appeal, the Court of Appeals for the Seventh Circuit reversed the district court's decision, finding that there was insufficient evidence to support the jury verdict and that the district court's denial of Transnation's motion for judgment as a matter of law was error.

B. The Initial Relationship Between Transnation and Mid America.

1. Transnation and Mid America Enter Into an Agency Agreement.

Transnation,[1] an Arizona Corporation with its headquarters in Richmond, Virginia, has been a title insurance underwriter for over 30 years but, prior to 1983, had never

1. Before September 20, 1995, Transnation was known as Transamerica. The parties referred to the company as Transnation throughout the trial and underlying briefing, regardless of the date of the reference. Transnation will continue that practice herein.

issued a title insurance policy for property located in Illinois. Although Transnation has offices and employees throughout the country, it has never had employees in the Chicago-area. Transnation has never issued an insurance policy in the Chicago-area that was not written by Mid America.

On December 19, 1983, hoping to break into the Chicago title insurance market, Transnation entered into the "Agency Agreement between Transamerica Title Insurance Company and Mid America Title Company" ("Agency Agreement"). The Agency Agreement appointed Mid America as the exclusive agent of Transnation for the purpose of issuing title insurance policies in a defined geographical area (the "Chicago-area"). Mid America is a title insurance agent founded by Ted Bond, Sr. ("Bond") along with a partner, in 1973.

The Agency Agreement between Mid America and Transnation provides for the appointment of Mid America as Transnation's exclusive agent in the Chicago-area, "solely for the promoting and transacting of title insurance business." Transnation covenanted "not to issue, directly or indirectly, policies covering real property within the territory other than through" Mid America. Mid America promised that "all policies issued by it, covering real property within the territory, shall be" Transnation policies. Transnation stated that it "does solicit employee transfer business and other national real estate transactions" and agreed that "all such business it obtains in" Mid America's territory including, but not limited to "business derived from any [Transnation] branch offices [sic]" shall be referred to Mid America. The Agency Agreement was to terminate in 1995 but was extended and now expires on December 31, 2005.

Mid America's duties include processing insurance applications, maintaining and preserving files for applications, issuing insurance policies, collecting premiums and remitting a portion to Transnation. Transnation's obligations include providing Mid America with policies and other forms, answering underwriting questions, arranging for reinsurance, and paying all claims incurred under a commitment, endorsement or insurance policy issued by Mid America.

In sum, the Agency Agreement pertains to real estate transactions taking place in the Chicago-area where Transnation is the title insurer. As to those – *but only those* – transactions, Transnation designated Mid America as its exclusive agent entitled to issue policies.

2. Mid America Begins as an Exclusive Agent for Transnation.

When Mid America became an agent for Transnation, Gary Opper ("Opper") of Transnation's Lansing, Michigan office was given responsibility for administering agency operations for Transnation. Prior to that date, Transnation did not have any agents, offices or employees in Illinois and had not issued any title insurance policies in Illinois. After entering into the Agency Agreement, Transnation still did not have any offices or employees in Illinois, nor did it issue any title insurance policies in the Chicago-area other than through Mid America.

As a part of his responsibilities for Transnation, Opper tried to help Mid America in its growth and profitability in the Chicago-area. For example, on Mid America's behalf,

Transnation entered into a plant.[2] access agreement with Chicago Title in Cook County. Chicago Title did not provide plant access to agents, only to other underwriters such as Transnation. The plant access agreement: (1) gave Mid America access to Chicago Title's title plant; and (2) passed on to Mid America the ten percent discount available to Transnation because it paid Chicago Title's annual access fee in advance as opposed to on a monthly basis. Mid America also asked Transnation to send claims work to Bond's son, Ted Bond, Jr., an attorney, and Transnation complied.

Transnation had a vested interest in assisting Mid America's growth: Mid America was, and is, Transnation's only representation in the Chicago-area. Due to the exclusive nature of the Agency Agreement, Transnation cannot have any direct operations in the Chicago-area. If Mid America grows, Transnation's presence in the Chicago-area grows. If Mid America is not effective in issuing title insurance policies in the Chicago-area, Transnation does not receive revenue and earns less (or no) profit in the area.

C. Changes Occur in the Ownership of Transnation.

On March 30, 1990, Reliance Insurance Company ("Reliance") acquired Transnation. At the time, Reliance owned Commonwealth; therefore, Transnation and Commonwealth became sibling subsidiaries sharing a parent corporation. Prior to 1990 and after, both Commonwealth and Transnation underwrote title insurance policies in the Chicago-area (Transnation solely through Mid America), and both competed for title insurance business. Prior to Transnation's acquisition by Reliance and continuing through the present, Commonwealth

2. "Plant" refers to records of recorded real estate transactions.

maintained offices in the Chicago-area while Transnation did not. Mid America was aware of the acquisition at the time it occurred and continued to be Transnation's exclusive agent in the Chicago-area. Reliance owned Transnation and Commonwealth from 1990 until February 27, 1998.

Once Reliance acquired Transnation, some Transnation employees were given responsibilities for certain Commonwealth functions. For instance, in Lansing, Michigan, Opper was a regional manager for Transnation; after the acquisition, he became regional manager for Commonwealth as well. His responsibilities were to ensure the overall development, growth and profitability of both Transnation and Commonwealth in certain states including Illinois. Although he had duties for both, Opper was a Transnation employee and only received a paycheck from Transnation. Opper had business cards for both Transnation and Commonwealth and used letterhead for both companies.

D. The Agency Agreement is Extended and Amended.

1. The Agency Agreement is Twice Amended to Permit Mid America to Issue Policies Underwritten by an Underwriter other than Transnation.

After Reliance acquired Transnation, making Transnation and Commonwealth sibling corporations, the Agency Agreement was amended to permit Mid America to enter into a non-exclusive agency contract with Commonwealth to issue title insurance policies underwritten by Commonwealth. That contract terminated in 1996. The amendment neither states nor implies that Mid America was entitled to a portion of premiums on *all* Commonwealth policies relating to property in the Chicago-area.

2. The Agency Agreement is Amended Several Times to Expand Mid America's Exclusive Territory.

In 1984 and, again, in 1990, the Agency Agreement was amended at Mid America's request to enlarge Mid America's territory. The 1990 amendment was made after Reliance acquired Transnation. However, that amendment neither states nor implies that Mid America is entitled to all of Commonwealth's business in the Chicago-area.

3. The Agency Agreement, Due to Expire in 1995, is Extended Until 2005.

On June 9, 1995, Transnation and Mid America amended the Agency Agreement, extending its term until December 31, 2005. The other relevant provisions, cited to above, remained the same. At the time, Mid America knew that Transnation and Commonwealth were sibling companies, however, the amendment neither provides nor suggests that Mid America was entitled to commissions on policies underwritten by Commonwealth.

E. Changes Occur in the Ownership of Transnation and Commonwealth.

On February 27, 1998, LandAmerica acquired all of the issued and outstanding shares of Transnation and Commonwealth. At that time, LandAmerica already owned Lawyers Title, another underwriter that issues title insurance policies in the Chicago-area. From 1998 through the present, LandAmerica has been the parent company of three subsidiaries, Transnation, Commonwealth and Lawyers Title.

LandAmerica, a Virginia corporation headquartered in Richmond, is a holding company, not an operating company. It is not engaged in business in Illinois and is not qualified with the Illinois Secretary of State to transact business here. LandAmerica and Mid America have no contractual relationship. LandAmerica is a publicly held company whose stock trades on the New York Stock Exchange.

F. The Relationship Among Transnation, Commonwealth, Lawyers Title and LandAmerica.

1. Each Corporation is a Separate and Distinct Entity.

From 1983 through the present, Transnation (exclusively through Mid America), Commonwealth and Lawyers Title have competed for title insurance business in the Chicago-area. Transnation, LandAmerica, Commonwealth and Lawyers Title are independent corporations, each of which has and controls its own accounting, financing, reporting, meeting, and operating functions. There is no dispute that the four corporations: maintain separate financial statements, corporate records, and accounting books; submit separate reports to the regulatory bodies that govern them; file individual tax returns; maintain separate bank accounts and funds and reserves for payment of claims; hold individual meetings of their boards of directors and shareholders; operate independently, solely supported by their own revenues; pay the salaries, workers' compensation, employee benefits and payroll taxes of their own employees; compete against one another for business; and are independently capitalized. Transnation employees are compensated based upon the deals brought in to Transnation offices; if Transnation loses a deal to Commonwealth or Lawyers Title, Transnation employees lose any compensation or commission

to be gained from that deal. No funds are shared among the three sibling corporations. Furthermore, the relationships among the companies are carefully regulated by the states to prevent LandAmerica from siphoning funds from its subsidiaries even if it so chose.

Since May, 1998, it has been the policy of Transnation, Commonwealth and Lawyers Title to not require a hold harmless letter for title insurance in Illinois if the prior insurer of the property at issue was one of those companies. A "hold harmless letter" is often issued in instances where a property seeking title insurance has been previously insured by another insurer and a title defect appears which pre-dates the prior policy. In the hold harmless letter, the prior insurer to agrees that if that particular defect should result in a claim, it will pay the losses on behalf of the new insurer.

While Transnation, Commonwealth and Lawyers Title decided to dispense with the formality of hold harmless letters, they did not dispense with the requirement that the prior insurer remains responsible to its insured to pay any claims that fall under its policy. For example, if Commonwealth was the prior insurer and Transnation (through Mid America) is to be the later insurer, before issuing a new policy containing no exception for a pre-existing title defect, Mid America is required to identify and retain a copy of the prior Commonwealth policy. If a claim arises from the pre-existing title defect, the procedure is the same as if there were a hold harmless letter in place: Transnation is responsible to its insured under Transnation's policy and has the right to seek reimbursement from Commonwealth.

Insurance companies are regulated by the states in which they are incorporated as well as each of the states in which they do business. Of particular import here are the insurance regulations of Illinois (215 ILCS 131.1, *et seq.*), as the business at issue was done here, Virginia (VA ST § 38.2-1005.1.1, *et seq.*), due to LandAmerica's status as the holding company, and Arizona (AZ ST § 20-481.1, *et seq.*), the place of Transnation's incorporation. Virtually all of the relationships among the companies are governed by these statutes, which have similar requirements and set standards for business transactions among affiliates, requiring prior notice and state approval before certain transactions. (*See* VA ST § 38.2-1330, 1331; 215 ILCS 5/131.20, 20a; AZ ST § 20-481.12). These requirements insure that money is available to pay claims and to insure that parent companies do not siphon off funds from their subsidiaries. As a wholly owned subsidiary, Transnation pays dividends to LandAmerica, but those dividends are regulated, restricted and limited in amount by the states. (*See* VA ST § 38.2-1322, 1330, 1331; 215 ILCS 5/131.20, 20a; AZ ST § 20-481.19).

Commonwealth and Lawyers Title have shared office space in Illinois, but Transnation has no office space in Illinois. Some individuals have simultaneously held positions with more than one company, but there is not, by any means, complete identity of employees. Likewise, there are some overlapping officers and directors of Transnation, Lawyers Title, Commonwealth and LandAmerica, but, again, there was no identity of officers and directors. For one example, while William S. Perrine is the corporate secretary of Transnation and Commonwealth, Russell Jordan is corporate secretary of LandAmerica, and the corporate secretary of Lawyers Title is John Weber.

It is important to note that Mid American has never alleged that any of the four corporations were sham corporations formed to siphon off Transnation's (and, thus, Mid America's) business. It never alleged that any agents or policyholders were confused about which underwriter they dealt with. And it never alleged that any of the sibling corporations or their parent ignored or neglected any corporate formalities or were formed for the purpose of committing fraud or crime.[3]

2. Transnation's Employee Transfer Business Was Referred to Mid America.

When Mid America became a Transnation agent, Transnation had an operation in Denver, Colorado called Title Transfer Company ("Title Transfer") which assisted third party relocation companies. In essence, when a large company transfers an employee from one location to another, a relocation company will buy the employee's house to facilitate the move. Title Transfer aided the relocation company by arranging for title insurance and closings. Since 1983, Title Transfer business relating to property located in the Chicago-area has been referred to Mid America.

From the late 1980s to the mid 1990s, Opper regularly communicated with Title Transfer personnel "to ensure that they were placing the transactions with Mid America." Neither the policy nor the regular communication changed

3. In order to disregard the "separate identities of affiliated corporations owned by the same parent, . . . it must be shown that another entity *actually dominated a sham corporation*." *CM Corp. v. Oberer Dev. Co.*, 631 F.2d 536, 539 (7th Cir. 1980) (dicta; emphasis in original), citing, *In the Matter of Bowen Transports, Inc.*, 551 F.2d 171, 179 (7th Cir. 1977).

when Transnation became affiliated with Commonwealth in 1990. Even after Transnation, Commonwealth and Lawyers Title became sibling corporations in 1998, Transnation continued to refer its business for property located in the Chicago-area to Mid America.

G. Mid America Retains an Attorney to Place an Order for Title Insurance with Transnation with No Intention of Actually Buying the Insurance.

In 2000. Bond attempted to retain attorneys around the country to submit to Transnation's nearest office bogus orders for title insurance commitments concerning property in the Chicago-area. The following facts are undisputed, and were part of the statement of uncontested facts submitted to the district court prior to trial. Mid America had no interest in obtaining this title insurance but was curious as to whether out-of-state Transnation offices would refer the orders to Mid America. In September, 2000, Mid America retained Anthony Mallgren ("Mallgren"), an attorney in Denver, Colorado, to place an order with one of Transnation's Denver offices for title insurance for property located in the Chicago-area. Mallgren was the only solicited attorney who agreed to participate in Mid America's plan. Pursuant to Mid America's direction, Mallgren contacted a Transnation office in Denver regarding a title insurance order for property located in the Chicago-area. The order should have been forwarded to Mid America but, instead, was inadvertently referred to an office of Lawyers Title in Chicago. The order was then canceled and no policy was ever purchased. Mallgren never intended to purchase title insurance for that property, nor did Mid America intend to issue a policy. No evidence was adduced at trial that any other title insurance order was ever placed with Transnation and directed to anyone but Mid America.

H. Facts Related to Counts III and IV of the Complaint, Which Were Voluntarily Dismissed by Mid America at Trial, yet Argued in its Petition.

Paragraph 4 of Amendment IV to the Agency Agreement permits Transnation to appoint attorney agents in the Chicago-area. In Count III of its Complaint, Mid America alleged that Mid America solicited Michael Freedman ("Freedman") to become an attorney agent for Transnation, that his application initially was accepted, then rejected by Transnation and that less than six months later, Freedman was accepted as a title insurance agent for Lawyers Title.

Freedman is a disbarred Illinois attorney who was indicted and convicted of bribing federal judges.[4] When Mid America solicited Freedman, he applied under the name Brock Lee, Ltd. However, as Transnation pointed out to Mid America, the Illinois Department of Financial Institutions rejected the application because Freedman was licensed in Illinois under a different name. Transnation told Mid America that Freedman's application could not be considered until the inconsistency was resolved to the satisfaction of the Illinois department. That never occurred. Subsequently, in 1999, Lawyers Title appointed B.L. Title as an authorized title insurance agent. Freedman's wife was president and sole owner of B.L. Title. Lawyers Title was unaware that Freedman had ever applied to be an agent of any sort for Transnation.

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4. In fact, due to his being disbarred, Freedman could not act as an attorney agent. When he was accepted by Lawyers Title, it was as a title insurance agent, a position Transnation did not have in Illinois due to its exclusive agreement with Mid America.

From 1990 through 1995, Preferred Land Title Insurance Company ("Preferred") was an agent for Commonwealth. In late 1995 or early 1996, Commonwealth canceled its agreements with Preferred due to irregularities in escrow accounts. At the time Commonwealth canceled its agreements with Preferred, Opper, on behalf of Commonwealth, caused the existing Commonwealth commitments for title insurance, which had already been issued by Preferred, to be transferred to Imperial Land Title ("Imperial"), another Commonwealth title insurance agent existing at the time. In its Count IV, Mid America appeared to argue that because Opper also had responsibilities for Transnation, he should have transferred this business to Mid America. Had he done so, he would have been giving Commonwealth business to Transnation.

I. The Complaint.

Mid America filed a six-count complaint against Transnation and LandAmerica. Neither Commonwealth nor Lawyers Title is named as a defendant in the complaint. While all six counts were at issue when the trial commenced, when the case was submitted to the jury, only Counts I and II remained, although Mid America was permitted to argue evidence related to the dismissed counts in its closing.

Count I alleges that from 1990 to the present, Transnation and Commonwealth were "commingled" and that, therefore, Transnation breached the Agency Agreement when "Commonwealth [issued] title insurance policies in" the Chicago-area, thus violating Transnation's contractual obligation "not to issue, directly or indirectly, policies covering real property within the territory other than through" Mid America.

Count II makes identical allegations pertaining to Lawyers Title concerning the period since 1998. Mid America claims Transnation breached the Agency Agreement by permitting personnel who were employees of both Transnation and Lawyers Title "to issue Lawyers Title title insurance policies in" the Chicago-area.

Mid America alleges that LandAmerica is bound by the Agency Agreement by reason of acquiring Transnation in 1998, allegedly sharing Chicago office space and "some, if not all, of the same officers, directors and trustees" with Transnation, Commonwealth and Lawyers Title, and allegedly "commingling" the operations of the four companies. In sum, Mid America's case rested on the premise that the four corporations were alter egos of one another and, therefore, the actions of Commonwealth and Lawyers Title of issuing title insurance policies in the Chicago area constituted the issuance of policies by Transnation, breaching the contract.

Count III alleged that Transnation and LandAmerica breached the Agency Agreement when Transnation declined to retain Freedman, the disbarred attorney solicited by Mid America who was later retained by Lawyers Title. Count IV alleged that Transnation breached the Agency Agreement because the existing business of Preferred, a Commonwealth agent, was transferred to another Commonwealth agent. Although Counts III and IV were dismissed during the trial, Mid America has argued the facts concerning these two Counts in its petition. It is only to respond to these assertions as well as Mid America's omission of material facts related to these claims that they are discussed in this opposition.

Count V alleged that Transnation and LandAmerica breached the Agency Agreement when Mallgren placed the bogus order with Transnation's Denver office and that order was referred to a Chicago office of Lawyers Title. The court granted defendants' Rule 50(a)(1) motion as to Count V due to Mid America's failure to prove any damages. However, Mid America requested, and the court granted, permission to reference the facts related to Count V during closing argument.

Count VI alleged that the Agency Agreement created a fiduciary relationship between Mid America and Transnation and that defendant breached its fiduciary duty to Mid America. Mid America dismissed Count VI during trial.

J. The Procedural History.

Trial by jury commenced on Wednesday, January 9, 2002. The following day, when Mid America rested, defendants moved pursuant to Rule 50(a)(1) for judgment as a matter of law. One ground for the motion was that there was no legally sufficient evidentiary basis for a reasonable jury to find that Transnation, Commonwealth, Lawyers Title and LandAmerica were alter egos of one another. The Court denied the motion as to all counts except Count V. Defendants renewed the motion at the close of evidence. The Court denied the renewed motion.

The jury was instructed late in the morning on Friday, January 11, 2002. At about 4:40 p.m., the jury announced that it had made its decision. The verdicts were: (a) in favor of LandAmerica; but (b) against Transnation in the amount of $1.5 million. On January 22, 2002, Transnation filed a motion for judgment as a matter of law, or, alternatively:

(a) to alter or amend the judgment; or (b) for a new trial. The motion was denied in its entirety on February 1, 2002. On appeal, the Court of Appeals for the Seventh Circuit reversed the district court's decision, finding that there was insufficient evidence to support the jury verdict and that the district court's denial of Transnation's motion for judgment as a matter of law was error.

REASONS FOR DENYING THE PETITION

A. The Seventh Circuit Applied the Appropriate Standard of Review and Did Not Hold that the Question of Whether to Pierce the Corporate Veil Should be Decided as a Matter of Law.

The petition should be denied because there is no question that the Seventh Circuit applied the appropriate standard in reviewing the district court's denial of Transnation's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). The court reviewed the denial of the motion *de novo*, appropriately seeing the motion for what it was – a challenge to the sufficiency of the evidence supporting the jury's verdict. While Mid America argues that the Seventh Circuit held that the decision to pierce the corporate veil should be made by the courts as a matter of law rather than by the trier of fact, the court made no such determination and refused to substitute its view of contested evidence for that of the jury. The court followed the same standard of review that each circuit has held to be the appropriate one. Mid America argues that the question of whether to treat sibling corporations as alter egos is a question of fact to be determined by the jury. The conclusion that Mid America appears to draw is that once such a determination is made by a jury, there can be no appellate review of the

verdict and that any reversal of a jury verdict can only be the result of an appellate court substituting its opinion for that of the jury. Such is clearly not the case. Fed. R. Civ. P. 50(b) and the decisions flowing from it are designed to set forth the appropriate standard of review for a jury's determination of facts after trial. The Seventh Circuit followed that standard here.

Mid America is simply wrong in its claim that the Seventh Circuit ignored the jury's findings of fact and determined instead that the question of whether to pierce the corporate veil and treat corporations as alter egos is a question of law to be determined by the courts. A plain reading of the appellate court's decision in this matter shows that this is not the case. Rather, the Seventh Circuit, as is proper for any appellate court in reviewing a district court's ruling on a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) or (b), reviewed the district court's findings *de novo* and analyzed whether there was a legally sufficient evidentiary basis for a reasonable jury to find for Mid America on the issue. It determined, rightly so, that there was not.

An appellate court "must determine *de novo* 'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed.'" *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372, 1376 (7th Cir. 1990), quoting *Fleming v. County of Kane*, 898 F.2d 553, 559 (7th Cir. 1990). Judgment as a matter of law pursuant to Rule 50 is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue."

Figueroa v. City of Chicago, 2000 WL 1047316 at *1 (N.D. Ill. July 27, 2000); *Harbor Motor Co., Inc. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 644 (7th Cir. 2001). The question is whether a rational jury could have reached the result this jury reached. In deciding this question, the Court may not substitute its view of contested evidence for the jury's. *Place v. Abbot Laboratories*, 215 F.3d 803, 809 (7th Cir. 2000)

Every circuit is in agreement with the Seventh Circuit that this is the proper standard of review to be applied in determining whether the district court acted properly in granting or denying a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) and (b). **First Circuit:** *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 75 (1st Cir. 2001) (review of denial of motion for judgment as a matter of law is *de novo*); **Second Circuit:** *National Communications Ass'n Inc. v. AT & T Corp.*, 238 F.3d 124, 127 (2d Cir. 2001) (review of denial of Rule 50(b) motion is *de novo*); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 43 (2d Cir. 2002) ("Judgment as a matter of law is appropriate when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"); **Third Circuit:** *Trabal v. Wells Fargo Armored Service Corp.*, 269 F.3d 243, 249 (3d Cir. 2001) (review of the district court's denial of a Rule 50(b) motion is plenary); **Fourth Circuit:** *South Atlantic Ltd. Partnership of Tennessee, L.P. v. Riese*, 284 F.3d 518, 532 (4th Cir. 2002) ("[w]e review *de novo* a district court's denial of a motion for judgment as a matter of law"); **Fifth Circuit**: *Arguello v. Conoco, Inc.*, 330 F.3d 355, 357 (5th Cir. 2003) (motion for judgment as matter of law in jury case is challenge to sufficiency of evidence supporting verdict); *Brown v. C.P. Interests, Inc. v. California Pools, Inc., et al.*,

238 F.3d 690, 693-94 (5th Cir. 2001) (the purpose of a Rule 50(b) motion, which is reviewed *de novo*, is "to enable the trial court to re-examine the question of evidentiary sufficiency as a matter of law if the jury returns a verdict contrary to the movant. . . ."); *Ford v. Cimarron Insurance Company, Inc.*, 230 F.3d 828, 830 (5th Cir. 2000) ("[a] motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict"); **Sixth Circuit**: *Garrison v. Cassens Transport*, 334 F.3d 528, 537 (6th Cir. 2003) (standard for review of denial of Rule 50(b) motion is *de novo*); *Gray v. Toshiba America Consumer Products, Inc.*, 263 F.3d 595, 598 (6th Cir. 2001) (same); **Eighth Circuit**: *Equal Employment Opportunity Commission v. Kohler Company*, 335 F.3d 766, 772 (8th Cir. 2003) (district court decisions on motions for judgment as a matter of law are reviewed *de novo*. In such instances, the appellate court "must determine whether there was sufficient evidence to support the jury's verdict"); *McKnight By and Through Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994) (same); **Ninth Circuit**: *McEuin v. Crown Equipment Corp.*, 328 F.3d 1028, 1036 (9th Cir. 2003) (same); **Tenth Circuit**: *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1099 (10th Cir. 2001) (review of district court's denial of motion for judgment as a matter of law is *de novo*); *Strickland Tower Maintenance, Inc. v. AT & T Communications, Inc.*, 128 F.3d 1422, 1426 (10th Cir. 1997); *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491 (10th Cir. 1994) (appellate court must determine whether there is evidence upon which jury could properly find for party against whom motion is directed); **Eleventh Circuit**: *Wood v. Green*, 323 F.3d 1309, 1312 (11th Cir. 2003) (review of district court's denial of motion for judgment as a matter of law is *de* novo; a party is entitled to judgment as a matter of law "if during a trial by

jury the opposing party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party on that issue").

The Seventh Circuit, and particularly the panel that heard Transnation's appeal, was well aware of the proper standard for reviewing a district court's decision to grant or deny a motion for judgment as a matter of law. The court's decision in this matter specifically stated that it viewed the evidence "tending to show that the underwriters were commonly controlled in the light most favorable to Mid America," which was the proper standard for the court to apply. The panel that decided Transnation's appeal was particularly cognizant of this standard and of the great deference given to a jury verdict as is evidenced by its decision in *Learning Curve Toys, Inc. v. Playwood Toys, Inc.*, 342 F.3d 714, 721 (7th Cir. 2003), a case argued the same day as and decided by the same panel as Transnation's appeal. In *Learning Curve*, the same panel that determined that there was insufficient evidence to support the jury verdict in favor of Mid America reversed the district court's grant of motion for judgment as a matter of law and reinstated the jury's verdict in favor of Playwood. *Id.* The panel followed Seventh Circuit precedent as stated above in declaring that motions for judgment as a matter of law are reviewed *de novo*, viewing the evidence in the light most favorable to the non-movant. *Id.* The court stated that it would not second-guess the jury's view of the contested evidence holding that "the proper inquiry is whether, given the totality of the evidence, non-movant presented sufficient evidence from which a reasonable jury could find in its favor." *Id.* It followed that same analysis that it did in the instant case, but arrived at the opposite conclusion.

There can be no question that the Seventh Circuit applied the appropriate standard in reviewing Transnation's appeal and that it did not hold that the determination of whether to pierce the corporate veil is a question of law for the court. The circuits are in agreement that the appropriate standard was applied and, therefore, Mid America's petition should be denied.

B. The Seventh Circuit's Decision that there Was Insufficient Evidence to Support the Jury's Verdict as a Matter of Law was Correct.

In order to show that the issuance of title insurance policies in the Chicago area by Commonwealth and Lawyers Title was a breach of the Agency Agreement by Transnation, Mid America had to show that these three corporations were alter egos of one another. The Seventh Circuit's decision was based on its determination that there was insufficient evidence from which a reasonable jury could conclude that the corporate veil between Transnation and its affiliates should be pierced and that the issuance of title insurance by Commonwealth and Lawyers Title should be attributed to Transnation.

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). The recognition that corporate personalities remain distinct has "its corollary in the 'well established principle that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership.'" *Bestfoods*, 524 U.S. at 69 (citation omitted).

Mid America sought, unsuccessfully, to undermine this doctrine. Mid America entered into the Agency Agreement solely with Transnation and not with any of the companies that later became its affiliates. Both Commonwealth and Lawyers Title competed with Transnation in the Chicago-area before the execution of the Agency Agreement. Neither Commonwealth nor Lawyers Title was created for the purpose of impacting adversely on Mid America's contract rights. No evidence suggests that Transnation was acquired with the intent of prejudicing, or that its affairs were conducted in a manner prejudicial to, Mid America.

This case presents a watershed issue. Mid America contends that Reliance's acquisition of Transnation in 1990, and LandAmerica's acquisition of Commonwealth and Transnation in 1998, caused a dramatic expansion of Mid America's exclusive agency rights. For Mid America to prevail, Transnation, LandAmerica, Commonwealth and Lawyers Title must be presumed to have become alter egos of each other simply because of the corporate acquisitions. That would be bad public policy and would result in unjust enrichment of Mid America. The transactions resulting in these companies becoming affiliates were entirely proper and produced synergistic economies of scale. Future such transactions would be discouraged if the Agency Agreement were deemed now to include a right of Mid America also to share in all of Commonwealth's and Lawyers Title's insurance premiums relating to property in the Chicago-area.

Efforts to pierce the corporate veil are governed by the state of incorporation of the company. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 933 (7th Cir. 1996). As Transnation is incorporated in Arizona, the law of Arizona governs. Any decision by a court to pierce

the corporate veil and impose liability on a corporation based on the actions of its affiliates should only be made when the "corporation is the alter ego or business conduit [of the other entity], and when to observe the corporation would work an injustice." *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 160, 876 P.2d 1190, 1195 (Ariz. App. 1994). "Where a corporation is operated and maintained for the purpose for which it was incorporated and not as a mere shield of the stockholders, the corporate form should not be disregarded." *Dietel v. Day*, 16 Ariz. App. 206, 208, 492 P.2d 455, 457 (1972). To pierce, a party must prove that "observance of the corporate form would sanction a fraud or promote injustice." *Horizon Resources Bethany Ltd. v. Cutco Industries, Inc.*, 180 Ariz. 72, 75, 881 P.2d 1177, 1180 (Ariz. App. 1994); *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37-38, 821 P.2d 725, 728-29 (1991).

Two corporations can be regarded as the same if one corporation so "control[s] and use[s] the other as a mere tool or instrument in carrying out its own plans and purposes that justice requires it be held liable for the results, or, there [is] such a confusion of identities and acts as to work a fraud upon third persons." *Deutsche Credit*, 179 Ariz. at 160, 876 P.2d at 1195, quoting *Jabczenski v. Southern Pac. Mem. Hosp., Inc.*, 119 Ariz. 15, 21, 579 P.2d 53, 59 (Ariz. App. 1978).

"A mere showing that one corporation is owned by another or that the two share interlocking officers or directors is insufficient to support a finding of alter ego." *Horizon*, 180 Ariz. at 75, 881 P.2d at 1180. One company does not become the alter ego of the other just because they "were housed in the same building, . . . had the same telephone number, . . . [and] shared a bookkeeper and another

employee." *Bischofshausen, Vasbinder & Luckie v. D.W. Jaquays Mining & Equipment Contractors Co.*, 145 Ariz. 204, 209, 700 P.2d 902, 907 (Ariz. App. 1985).

While stock ownership and the existence of common officers and directors are among the criteria under Arizona law to determine substantially total control, courts must also look at: financing of one corporation by the other; payment of salaries and other expenses of one corporation by the other; failure to maintain formalities of separate corporate existence; plaintiff's lack of knowledge of separate corporate existence; making of interest free loans by one entity to the other; failure of the corporation to maintain corporate financial records; commingling of funds; diversion of funds from one entity to the other; filing of corporate tax returns; failure to observe formalities of corporate meetings; and failure to issue annual reports. *Deutsche Credit*, 179 Ariz. at 160-61, 876 P.2d at 1195-96; *Gatecliff*, 170 Ariz. at 37, 821 P.2d at 728; *Ize Nantan Bagowa, Ltd. v. Scalia*, 118 Ariz. 439, 443, 577 P.2d 725, 729 (Ariz. App. 1978) (undercapitalization "is an important factor in determining whether the doctrine of alter ego should be applied" and must be shown "by a preponderance of the evidence"). Mid America did not prove a single one of these criteria.

The entirety of Mid America's evidence that these companies are alter egos of one another was the following: Transnation and Commonwealth have been siblings since 1990; since 1998 those corporations and Lawyers Title have been wholly owned subsidiaries of LandAmerica; the corporations have some overlapping officers, directors and employees, some of whom carry business cards for more than one of the corporations; the corporations do not require hold harmless letters among themselves; Mid America received

some correspondence and announcements on Commonwealth letterhead; on the corporations' shared website a search for a Transnation office in Chicago listed a Commonwealth office; and the corporations were referred to as the LandAmerica family in some advertising done in April, 2001. Under the law, such evidence is insufficient to show alter ego.

The evidence at trial was undisputed that the four corporations: maintain separate financial statements, corporate records, and accounting books; submit separate reports to the regulatory bodies that govern them; maintain separate bank accounts and funds and reserves for payment of claims; hold individual meetings of their boards of directors and shareholders; operate independently, solely supported by their own revenues; pay the salaries, workers' compensation, employee benefits and payroll taxes of their own employees; compete against one another for business; and are independently capitalized. Transnation employees are compensated based upon the deals brought in to Transnation offices; if Transnation loses a deal to Commonwealth or Lawyers Title, Transnation employees lose any compensation or commission to be gained from that deal. Furthermore, the relationships among the companies are carefully regulated by the states to prevent LandAmerica from siphoning funds from its subsidiaries even if it so chose.

As the jury was instructed, and as shown above, Mid America had to prove that the existence of the separate corporate entities should be disregarded because LandAmerica "engaged in a course of conduct ignoring the existence of the other corporations' corporate identities" and "exercised such paramount control" over the corporations "that their corporate existence has been disregarded." There was insufficient evidence for a reasonable jury to

determine that these corporations were alter egos of one another. The Seventh Circuit's reversal of the district court's denial of Transnation's motion for judgment as a matter of law was proper and decided by the appropriate standard.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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